

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

CORY E. COX,

Plaintiff,

v.

MICHAEL J. ASTRUE,  
Commissioner of Social  
Security,

Defendant.

No. CV-08-0236-CI

ORDER GRANTING PLAINTIFF'S  
MOTION FOR SUMMARY JUDGMENT  
AND DENYING DEFENDANT'S  
MOTION FOR SUMMARY JUDGMENT

BEFORE THE COURT are cross-Motions for Summary Judgment (Ct. Rec. 13, 16.) Attorney Maureen J. Rosette represents Plaintiff; Special Assistant United States Attorney Thomas M. Elsberry represents Defendant. The parties have consented to proceed before a magistrate judge. (Ct. Rec. 7.) After reviewing the administrative record and briefs filed by the parties, the court **GRANTS** Plaintiff's Motion for Summary Judgment, and remands the matter to the Commissioner for additional proceedings pursuant to sentence four 42 U.S.C. § 405(g).

**JURISDICTION**

On December 12, 2005, Cory E. Cox (Plaintiff) applied for Disability Insurance benefits and Social Security Income (SSI) benefits. (Tr. 64-65, 319-21.) Plaintiff alleged disability due to mental health issues of social anxiety, depression and possible bipolar disorder. (Tr. 117.) At the hearing, Plaintiff requested a closed period of disability from December 1, 2003, through August 1,

ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT  
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1 2007. (Tr. 15, 328.) Benefits were denied initially and on  
2 reconsideration. Plaintiff requested a hearing before an  
3 administrative law judge (ALJ), which was held before ALJ Hayward  
4 Reed on December 12, 2007. (Tr. 327-70.) Plaintiff, who was  
5 represented by counsel; medical expert Allen D. Bostwick, Ph.D.; and  
6 vocational expert Fred Cutler (VE) testified. The ALJ denied  
7 benefits on January 15, 2008, and the Appeals Council denied review.  
8 (Tr. 4-6, 15-28.) The instant matter is before this court pursuant  
9 to 42 U.S.C. § 405(g).

#### 10 STATEMENT OF THE CASE

11 The facts of the case are set forth in detail in the transcript  
12 of proceedings and are briefly summarized here. Plaintiff was 29  
13 years old at the time of the hearing. He was divorced, without  
14 children. He went to high school until 11<sup>th</sup> grade, and later  
15 obtained his high school equivalency degree. (Tr. 341-42.) He  
16 testified he had some special education classes while in school and  
17 still had trouble with reading. (Tr. 342.) He had past work  
18 experience as a telemarketer, telephone survey caller, injection  
19 molding machine off-bearer, and production assembler. (Tr. 128.)  
20 He reported he could not work during his alleged closed period of  
21 disability due to severe psychological problems and an inability to  
22 be around people without breaking down. (Tr. 343.)

#### 23 ADMINISTRATIVE DECISION

24 ALJ Reed found Plaintiff met insured status requirements for  
25 DIB benefits through December 31, 2003. (Tr. 18.) At step one, he  
26 found Plaintiff had not engaged in substantial gainful activity  
27 during the closed period (*Id.*) At step two, he found Plaintiff had  
28

1 the following severe impairments: "depressive disorder not otherwise  
2 specified, social phobia with symptoms of posttraumatic stress  
3 disorder and occasionally panic attack symptoms, personality  
4 disorder not otherwise specified with avoidant and inadequate  
5 features, cannabis dependence, and mild scoliosis." (*Id.*) At step  
6 three, he found Plaintiff's physical and mental impairments, alone  
7 or in combination, did not meet or medically equal an  
8 administratively recognized level impairment listed in Appendix 1,  
9 Subpart P, Regulations No. 4 (Listings). (Tr. 18.) He concluded,  
10 however, that with the effects of substance abuse, Plaintiff could  
11 not perform past work, or other work in the national economy, and  
12 was therefore disabled. (Tr. 20-21.)

13 After conducting a second sequential evaluation without the  
14 effects of substance abuse, the ALJ concluded drug abuse was a  
15 contributing factor material the initial finding of disability.  
16 (Tr. 21-27.) He found that without the effects of substance abuse,  
17 Plaintiff could perform past relevant work as a production  
18 assembler, injection molding machine off-bearer, hand packer, and  
19 survey worker, and was, therefore, not disabled, as defined by the  
20 Social Security Act. (Tr. 27.)

#### 21 STANDARD OF REVIEW

22 In *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9<sup>th</sup> Cir. 2001), the  
23 court set out the standard of review:

24 A district court's order upholding the Commissioner's  
25 denial of benefits is reviewed *de novo*. *Harman v. Apfel*,  
26 211 F.3d 1172, 1174 (9th Cir. 2000). The decision of the  
27 Commissioner may be reversed only if it is not supported  
28 by substantial evidence or if it is based on legal error.  
*Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999).  
Substantial evidence is defined as being more than a mere  
scintilla, but less than a preponderance. *Id.* at 1098.

1 Put another way, substantial evidence is such relevant  
2 evidence as a reasonable mind might accept as adequate to  
3 support a conclusion. *Richardson v. Perales*, 402 U.S.  
4 389, 401 (1971). If the evidence is susceptible to more  
5 than one rational interpretation, the court may not  
6 substitute its judgment for that of the Commissioner.  
7 *Tackett*, 180 F.3d at 1097; *Morgan v. Commissioner*, 169  
8 F.3d 595, 599 (9th Cir. 1999).

9  
10 The ALJ is responsible for determining credibility,  
11 resolving conflicts in medical testimony, and resolving  
12 ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th  
13 Cir. 1995). The ALJ's determinations of law are reviewed  
14 *de novo*, although deference is owed to a reasonable  
15 construction of the applicable statutes. *McNatt v. Apfel*,  
16 201 F.3d 1084, 1087 (9th Cir. 2000).

### 17 SEQUENTIAL PROCESS

18 Also in *Edlund*, 253 F.3d at 1156-1157, the court set out the  
19 requirements necessary to establish disability:

20 Under the Social Security Act, individuals who are  
21 "under a disability" are eligible to receive benefits. 42  
22 U.S.C. § 423(a)(1)(D). A "disability" is defined as "any  
23 medically determinable physical or mental impairment"  
24 which prevents one from engaging "in any substantial  
25 gainful activity" and is expected to result in death or  
26 last "for a continuous period of not less than 12 months."  
27 42 U.S.C. § 423(d)(1)(A). Such an impairment must result  
28 from "anatomical, physiological, or psychological  
abnormalities which are demonstrable by medically  
acceptable clinical and laboratory diagnostic techniques."  
42 U.S.C. § 423(d)(3). The Act also provides that a  
claimant will be eligible for benefits only if his  
impairments "are of such severity that he is not only  
unable to do his previous work but cannot, considering his  
age, education and work experience, engage in any other  
kind of substantial gainful work which exists in the  
national economy. . . ." 42 U.S.C. § 423(d)(2)(A). Thus,  
the definition of disability consists of both medical and  
vocational components.

29 In evaluating whether a claimant suffers from a  
30 disability, an ALJ must apply a five-step sequential  
31 inquiry addressing both components of the definition,  
32 until a question is answered affirmatively or negatively  
33 in such a way that an ultimate determination can be made.  
34 20 C.F.R. §§ 404.1520(a)-(f), 416.920(a)-(f). "The  
35 claimant bears the burden of proving that [s]he is  
36 disabled." *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir.  
37 1999). This requires the presentation of "complete and  
38

1 detailed objective medical reports of h[is] condition from  
2 licensed medical professionals." *Id.* (citing 20 C.F.R. §§  
404.1512(a)-(b), 404.1513(d)).

3 It is the role of the trier of fact, not this court, to resolve  
4 conflicts in evidence. *Richardson*, 402 U.S. at 400. If evidence  
5 supports more than one rational interpretation, the court may not  
6 substitute its judgment for that of the Commissioner. *Tackett*, 180  
7 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9<sup>th</sup> Cir. 1984).  
8 Nevertheless, a decision supported by substantial evidence will  
9 still be set aside if the proper legal standards were not applied in  
10 weighing the evidence and making the decision. *Browner v. Secretary*  
11 *of Health and Human Services*, 839 F.2d 432, 433 (9<sup>th</sup> Cir. 1988). If  
12 there is substantial evidence to support the administrative  
13 findings, or if there is conflicting evidence that will support a  
14 finding of either disability or non-disability, the finding of the  
15 Commissioner is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-  
16 1230 (9<sup>th</sup> Cir. 1987).

#### 17 ISSUES

18 The question is whether the ALJ's decision is supported by  
19 substantial evidence and free of legal error. Plaintiff argues the  
20 ALJ erred when he (1) failed to provide specific and legitimate  
21 reasons for rejecting examining physician opinions, and (2)  
22 improperly relied on the non-examining medical expert's opinion. He  
23 further contends the ALJ's mental RFC findings were not supported by  
24 the evidence. (Ct. Rec. 14.)

#### 25 DISCUSSION

##### 26 A. Sequential Evaluation in the Context of Substance Abuse

27 Where drug and/or alcohol abuse (DAA) is a consideration during  
28

1 disability proceedings, the Regulations implemented by the  
2 Commissioner require the ALJ to follow a specific two-step analysis.  
3 20 C.F.R. §§ 404.1535(a), 416.935(a). First, the ALJ must conduct  
4 the five-step sequential evaluation without attempting to determine  
5 the impact of DAA. If the ALJ finds that the claimant is not  
6 disabled under the five-step inquiry, the claimant is not entitled  
7 to benefits, and there is no need to proceed with further analysis.  
8 *Id.* If the ALJ finds that claimant is disabled, and there is  
9 evidence that DAA is a contributing factor material to disability,  
10 the ALJ should proceed under the sequential evaluation and §§  
11 404.1535 or 416.935 to determine if the claimant would still be  
12 disabled if he stopped using drugs and alcohol. *Bustamante v.*  
13 *Massanari*, 262 F.3d 949, 955 (9<sup>th</sup> Cir. 2001).

14 If found disabled with the effects of substance addiction, it  
15 is the claimant's burden to prove substance addiction is not a  
16 contributing factor material to her disability. *Parra v. Astrue*,  
17 481 F.3d 742, 748 (9<sup>th</sup> Cir. 2007). As stated by the *Parra* court, a  
18 drug addicted claimant "who presents inconclusive evidence of  
19 materiality has no incentive to stop [abusing drugs], because  
20 abstinence may resolve his disabling limitations and cause his claim  
21 to be rejected or his benefits terminated." *Id.* Thus, through the  
22 CAAA, Congress seeks "to discourage alcohol and drug abuse, or at  
23 least not to encourage it with a permanent government subsidy."  
24 *Ball v. Massanari*, 254 F.3d at 817, 824 (9<sup>th</sup> Cir. 2001).

25 Here, the ALJ conducted a two step analysis. In the first  
26 sequential evaluation, ALJ Reed found that although Plaintiff's  
27 impairments, including substance abuse, did not meet or equal a  
28 Listing, Plaintiff had moderate to marked limitations in his

1 functioning due to mental health issues that prevented him from  
2 performing his past work or other work in the national economy.  
3 (Tr. 21.)

4 The ALJ then found that if Plaintiff stopped the substance  
5 abuse, Plaintiff would continue to have "severe impairments, or  
6 combination of impairments," that would not meet or equal the  
7 Listings. (Tr. 21-22.) Based in part on medical expert testimony,  
8 and the findings of agency psychologist Sharon Underwood, Ph.D., the  
9 ALJ made a second RFC determination. (Tr. 22, 26.) He concluded  
10 that, without substance abuse, Plaintiff would have the RFC to  
11 perform medium work, had "good use of his hands and arms for  
12 grasping, holding, and turning objections," but required the ability  
13 to sit intermittently. (Tr. 22.) Regarding non-exertional  
14 limitations due to mental impairments, the ALJ further found:

15 The claimant can perform simple and detailed tasks. He  
16 does not like to be alone, but he would likely be  
17 overwhelmed with frequent contact with the public. He  
18 likes to have attention and this occasionally might be a  
19 distraction to others. The claimant would be able to  
20 handle occasional changes in the work setting.

21 (*Id.*) Considering "all evidence relating to how the claimant would  
22 function" if the substance use was stopped, as well as VE testimony  
23 and Plaintiff's credible statements, the ALJ found Plaintiff could  
24 perform work activities of past relevant work. (Tr. 27.)

## 25 **B. Medical Opinions**

26 Plaintiff argues the ALJ improperly rejected the medical  
27 opinions of examining psychologists Mahlon Dalley, Ph.D., Kayleen  
28 Islam-Zwart, Ph.D., and James Bailey, Ph.D., all of whom examined  
Plaintiff during the alleged closed period of disability. (Tr. 152-  
160, 177-84, 185-95.) He contends these medical sources identified

1 mental limitations that, if properly credited, would support a  
2 finding of disability. (Ct. Rec. 14 at 18.)

3 In disability proceedings, an examining physician's opinion is  
4 given more weight than that of a non-examining physician. *Benecke*  
5 *v. Barnhart*, 379 F.3d 587, 592 (9<sup>th</sup> Cir. 2004). If an examining  
6 physician's opinion is not contradicted, it can be rejected only  
7 with "clear and convincing" reasons. *Lester v. Chater*, 81 F.3d 821,  
8 830 (9<sup>th</sup> Cir. 1995). When rejecting conflicting examining or  
9 treating medical source opinions, the ALJ must "make findings  
10 setting forth specific, legitimate reasons for doing so that are  
11 based on substantial evidence in the record." *Sprague*, 812 F.2d at  
12 1230; see also *Flaten v. Secretary of Health and Human Services*, 44  
13 F.3d 1453, 1463 (9<sup>th</sup> Cir. 1995).

14 To meet this burden, the ALJ can set out "a detailed and  
15 thorough summary of the facts and conflicting clinical evidence,  
16 stating his interpretation thereof, and making findings." *Cotton v.*  
17 *Bowen*, 799 F.2d 1403, 1408 (9<sup>th</sup> Cir. 1986). Historically, the  
18 courts have recognized conflicting medical evidence, the absence of  
19 regular medical treatment during the alleged period of disability,  
20 and the lack of medical support for doctors' reports based  
21 substantially on a claimant's subjective complaints, as specific,  
22 legitimate reasons for disregarding an examining physician's  
23 opinion. *Flaten*, 44 F.3d at 1463-64; *Fair v. Bowen*, 885 F.2d 597,  
24 604 (9<sup>th</sup> Cir. 1989).

25 Dr. Dalley and mental health counselor Brooke Sjostrom (M.S.)  
26 evaluated Plaintiff on April 12, 2005. They administered the  
27 Minnesota Multiphasic Personality Inventory-2 (MMPI-2); a mini  
28 Mental Status Exam (MSE); and Trails A and B. The results of their



1 examination are included in a narrative report and  
2 psychological/psychiatric report form. (Tr. 177-84.) In the  
3 narrative report, the evaluators noted "marked" severity for  
4 depressed mood, verbal expression of anxiety/fear and social  
5 withdrawal. (Tr. 179.) "Marked" functional limitations (social)  
6 were also noted in the evaluation report form in three areas:  
7 ability to relate appropriately to co-workers and supervisors;  
8 ability to interact appropriately in public contacts; and ability to  
9 respond appropriately to the pressures and expectations of a work  
10 setting, with an estimated severity duration of six to twelve  
11 months. (Tr. 183.) There was no evidence of malingering or  
12 exaggeration noted in objective test results. (Tr. 179.) The  
13 examining professionals opined that once Plaintiff's depressive and  
14 anxiety symptoms stabilized, Plaintiff "should be able to function  
15 in an entry-level work environment that requires minimal contact  
16 with co-workers and supervisors." (Tr. 180.) During the interview,  
17 Plaintiff denied drug use in the last five years. (Tr. 177.)

18 Dr. Islam-Zwart and mental health counselor Abigail Osborne-  
19 Elmer (M.S.) re-evaluated Plaintiff on October 6, 2005. The same  
20 objective psychological tests, plus a "Work Potential Profile," were  
21 administered. Results were also interpreted in a narrative report,  
22 and summarized in a psychological/psychiatric report form. (Tr.  
23 189-94.) Based on the objective data collected, moderate severity  
24 was assessed in: depressed mood, verbal expression of anxiety/fear,  
25 social withdrawal and paranoid behavior. (Tr. 189.) Neither  
26 invalidity nor malingering was indicated. (Tr. 187.) The evaluator  
27 observed that Plaintiff's symptoms would interfere with his ability  
28

1 to tolerate the stress of a normal work environment. (*Id.*) Dr.  
2 Islam-Swart's report concluded Plaintiff would be able to return to  
3 work with minimal contact of co-workers and supervisors once his  
4 symptoms were stabilized. (Tr. 189.) The accompanying report form  
5 indicated "marked" functional limitations in the same areas noted by  
6 Dr. Dalley and Ms. Sjostrom, with an estimated severity duration of  
7 six months. (Tr. 193-94.) During the interview, Plaintiff denied  
8 current drug abuse. (Tr. 186.)

9 Dr. Bailey examined Plaintiff in May 2006. He provided a  
10 narrative report, with test results, and an evaluation form report  
11 summarizing his findings. (Tr. 152-160.) He conducted a MSE, and  
12 administered the following objective psychological tests: the Rey  
13 15-Item test and the Wechsler Adult Intelligence Scale. Plaintiff's  
14 IQ results were within the normal/average range. Although Dr.  
15 Bailey questioned Plaintiff's effort on the MSE, he found no clear  
16 evidence of malingering. (Tr. 153, 154.) During the interview,  
17 Plaintiff reported no marijuana use in the last six years. (Tr.  
18 153.) In his narrative report, Dr. Bailey opined Plaintiff would  
19 have trouble with supervisors and coworkers, but recommended getting  
20 employer reports to confirm Plaintiff's self-report. (Tr. 156.)

21 In his second sequential evaluation, the ALJ briefly referenced  
22 these psychological assessments and gave them "little weight." (Tr.  
23 26.) In discounting the opinions, he reasoned the evaluations were  
24 completed by "non-treating mental health professionals," at a single  
25 examination, and were "predicated on self-report in a secondary gain  
26 context." (*Id.*) He also found it was not "clear ... whether the  
27 claimant's substance abuse was considered." (*Id.*) These reasons  
28 are not sufficiently "specific" or "legitimate" to reject completely

1 the extensive findings included in the examining psychologists'  
2 narrative reports. In addition, the ALJ did not summarize or  
3 discuss the detailed narrative reports and test results submitted  
4 with the rejected "check box" forms in either sequential evaluation.  
5 The ALJ did not meet his burden under the legal standard applicable  
6 to the opinions of examining physicians. Therefore, his disability  
7 determination is based on reversible legal error. *Lester*, 81 F.3d  
8 at 831.

9 Plaintiff also contends the ALJ erred in relying on medical  
10 expert Dr. Bostwick's testimony. (Ct. Rec. 18 at 14.) The analysis  
11 and opinion of a non-examining medical expert selected by the ALJ  
12 may be helpful in his adjudication. *Andrews*, 53 F.3d at 1041.  
13 However, testimony of a medical expert may serve as substantial  
14 evidence only when supported by other competent evidence in the  
15 record. *Id.* Here, the ALJ's reliance on Dr. Bostwick's testimony  
16 regarding Plaintiff's RFC without the effects of substance abuse is  
17 supported only by the opinions of Sharon Underwood, a non-examining  
18 psychologist, and in part by the opinions of Paul Michels, M.D.,  
19 psychiatrist who examined Plaintiff one time on January 31, 2005.  
20 It is noted, however, that unlike Drs. Dalley and Islam-Zwart, Dr.  
21 Michels did not administer objective psychological tests to support  
22 his diagnoses or conclusions. Rather, his findings are based on a  
23 review of Plaintiff's applications for state welfare and his self-  
24 report during a one-time interview. (Tr. 171.)

25 Specifically, Dr. Michels noted Plaintiff was neither involved  
26 in mental health treatment nor taking medication for his  
27 psychological impairments. (Tr. 175-76.) He considered Plaintiff's  
28 prognosis as "guarded," with focus and concentration mildly

1 impaired, pace and persistence mildly impaired. (Tr. 176.) Dr.  
2 Michels opined Plaintiff was capable of understanding, remembering,  
3 and following simple instructions, but would have occasional  
4 difficulties in completing specific tasks in a timely or consistent  
5 manner. Consistent with Drs. Dalley and Islam-Zwart, Dr. Michels  
6 observed Plaintiff's difficulty interacting with others caused the  
7 majority of his job-related problems. (*Id.*) This report, and the  
8 report of Dr. Underwood, a non-examining psychologist, is not  
9 substantial evidence (1) to reject completely the reports of other  
10 qualified examining psychologists who based their opinions on an  
11 interview and objective testing; or (2) to support the conflicting  
12 assessment of a non-examining medical expert. *Lester*, 81 F.3d at  
13 831. The ALJ's rejection of Drs. Dalley, Islam-Zwart, and Bailey's  
14 opinions and reliance on Dr. Bostwick's testimony is unsupported by  
15 substantial evidence and based on legal error.<sup>1</sup> *Browner*, 839 F.2d  
16 at 433; see also *Magallanes v. Bowen*, 881 F.2d 747, 751 (9<sup>th</sup> Cir.  
17 1989).

18  
19 <sup>1</sup> Defendant's argument that the ALJ's failure to reject  
20 examining medical source opinions supported by objective testing is  
21 harmless error is not persuasive. (Ct. Rec. 17 at 15.) As  
22 discussed below, the failure to include unrejected mental  
23 limitations in the hypothetical questions to the VE may have  
24 prejudiced Plaintiff significantly at step four. The court cannot  
25 "confidently conclude" that no reasonable ALJ could have reached a  
26 different disability determination if the erroneously rejected  
27 medical opinions were credited. *Stout v. Commissioner, Social Sec.*  
28 *Admin.*, 454 F.3d 1050, 1056 (9<sup>th</sup> Cir. 2006).

1 **C. Step Four - RFC Findings and Past Relevant Work**

2 At step four, the Commissioner makes RFC findings, and  
3 determines if a claimant can perform past relevant work. Although  
4 the burden of proof lies with the claimant at step four, the ALJ  
5 still has a duty to make the requisite factual findings to support  
6 his conclusion. *Social Security Ruling (SSR) 82-62*. This is done  
7 by looking at the "residual functional capacity and the physical and  
8 mental demands" of the claimant's past relevant work. 20 C.F.R. §§  
9 404.1520(a)(4)(iv) and 416.920 (a)(4)(iv). The Commissioner has  
10 defined the RFC as is an "assessment of an individual's ability to  
11 do sustained work-related physical and mental activities in a work  
12 setting on a regular and continuing basis," i.e., for eight hours a  
13 day for five days a week, or an equivalent work week. *SSR 96-8p*.  
14 Past relevant work is work performed in the last 15 years, lasted  
15 long enough to learn it and was substantial gainful employment. *SSR*  
16 *82-61*. In a step four finding that an individual has the capacity to  
17 perform a past relevant job, the decision must contain among the  
18 findings the following specific findings of fact:

19 1. A finding of fact as to the individual's residual  
20 functional capacity;

21 2. A finding of fact as to the physical and mental demands of  
22 the past job/occupation; and

23 3. A finding of fact that the individual's residual  
24 functional capacity would permit a return to his or her past job or  
25 occupation. *SSR 82-62*.

26 These findings must be based on the evidence in the record and  
27 must be developed and fully explained in the disability decision.  
28 Evidence of the physical and mental requirements of a particular job

1 may be found in the DICTIONARY OF OCCUPATIONAL TITLES, other  
2 administratively recognized publications, or vocational expert  
3 testimony. SSR 82-61. Vocational experts are used most often at an  
4 ALJ hearing. SSR 00-4p. Step four requires specific findings on  
5 all three points sufficient "to insure that the claimant really can  
6 perform his past relevant work." *Pinto v. Massanari*, 249 F.3d 840,  
7 845 (9<sup>th</sup> Cir. 2001); see also SSR 00-40.

8 At the hearing, the VE testified that based on the written  
9 record and Plaintiff's hearing testimony, Plaintiff had past  
10 relevant work as a production assembler, telemarketer and survey  
11 worker, injection molding machine off-bencher, and hand packer. (Tr.  
12 359-61; see also Tr. 128.) At step four of the sequential  
13 evaluation without the effects of substance abuse, the ALJ found  
14 Plaintiff could perform these jobs. (Tr. 26.) However, the ALJ  
15 made no findings regarding the mental demands of these jobs or the  
16 effects of Plaintiff's unrejected mental limitations on his ability  
17 to complete a normal workday and workweek. An ALJ's failure to  
18 provide detailed step four findings, including an explanation of the  
19 physical and mental demands of a claimant's past jobs is reversible  
20 error. *Pinto*, 249 F.3d at 845.

21 The ALJ's first hypothetical question described an individual  
22 with "moderate" limitations in his ability to work in coordination  
23 with others, interact appropriately with the general public, with no  
24 significant limitation in his ability to complete a workweek without  
25 interruptions from psychologically based symptoms. (Tr. 365.)  
26 These limitations are not supported by Dr. Michels' unrejected  
27 conclusions that Plaintiff suffered a personality disorder that  
28 would cause difficulty interacting with others, "occasional

1 difficulties completing specific tasks in a timely or consistent  
2 manner," and stress-induced psychological distress that would make  
3 it "difficult again for him to complete specific tasks in a timely  
4 or consistent manner." (Tr. 176.) It is noted on independent  
5 review that reports of these limitations are consistent throughout  
6 the record. (See, e.g., Tr. 176, 183, 193, 314.) In another  
7 hypothetical, the ALJ included limitations found in Dr. Michels'  
8 report (Tr. 176, 369), and the VE testified the individual probably  
9 could not sustain work. (Tr. 370.) Thus, the VE's testimony in  
10 response to this hypothetical is not conclusive that Plaintiff could  
11 perform his past work.

12 Further error was the failure to include in the hypothetical  
13 those functional limitations identified by examining psychologists  
14 that were not rejected by the requisite "specific and legitimate"  
15 reasons, as discussed above. See *Magallanes*, 881 F.2d at 756;  
16 *Embrey v. Bowen*, 849 F.2d 418, 422 (9<sup>th</sup> Cir. 1988) (VE testimony has  
17 no evidentiary value if hypothetical question is not supported by  
18 substantial evidence). The step four findings are, therefore, not  
19 supported by substantial evidence.

#### 20 **D. Remedy**

21 There are two remedies where the ALJ fails to provide adequate  
22 reasons for rejecting the opinions of an examining psychologist.  
23 The general rule, found in the *Lester* line of cases, is that "we  
24 credit that opinion as a matter of law." *Lester*, 81 F.3d at 834;  
25 *Pitzer v. Sullivan*, 908 F.2d 502, 506 (9<sup>th</sup> Cir. 1990); *Hammock v.*  
26 *Bowen*, 879 F.2d 498, 502 (9<sup>th</sup> Cir. 1989). Under the alternate  
27 approach found in *McAllister*, *supra*, a court may remand to allow the  
28 ALJ to provide the requisite specific and legitimate reasons for

disregarding the opinion. See also *Salvador v. Sullivan*, 917 F.2d 13, 15 (9<sup>th</sup> Cir. 1990)(citing *McAllister*). Where evidence has been identified that may be a basis for a finding, but the findings are not articulated, remand is the proper disposition. See *Gonzalez v. Sullivan*, 914 F.2d 1197, 1202 (9<sup>th</sup> Cir. 1990). Further, remand for additional proceedings is proper where, as here, there are issues that must be resolved relating to the effects of Plaintiff's documented substance abuse on his mental limitations during the alleged closed period of disability. See *Smolen v. Chater*, 80 F.3d 1273, 1291-92 (9<sup>th</sup> Cir. 1996). Accordingly,

**IT IS ORDERED:**

1. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 13**) is **GRANTED** and the matter is remanded to the Commissioner for additional proceedings consistent with the decision above and pursuant to sentence four of 42 U.S.C. § 405(g);

2. Defendant's Motion for Summary Judgment (**Ct. Rec. 16**) is **DENIED**;

3. Application for attorney's fees may be filed by separate motion.

The District Court Executive is directed to file this Order and provide a copy to counsel for Plaintiff and Defendant. Judgment shall be entered for **PLAINTIFF** and the file shall be **CLOSED**.

DATED June 29, 2009.

S/ CYNTHIA IMBROGNO  
UNITED STATES MAGISTRATE JUDGE